

RAFAEL V. VASQUEZ
Claimant

IBP, INC.

Respondent
Self-Insured

The Administrative Law Judge determined claimant suffered a 28 percent work disability as a result of his work-related accident. The claimant requested review of the nature and extent of disability. Claimant argues he injured his shoulder and the Administrative Law Judge erred in failing to consider the task loss opinion of Dr. Murati, which included restrictions based upon permanent impairment to the shoulder.

Conversely, respondent argues it was appropriate to base the task loss percentage upon the treating physician's opinion which did not include an injury to claimant's shoulder.

Because the parties stipulated to claimant's functional impairment as well as his percentage of wage loss, the only issue for Board determination is the percentage of claimant's task loss.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained an injury to his shoulders, hands, neck, collar bone, and his left elbow on or about June 1, 1999. Claimant's job at the time of the injury was a chuck boner. This job required the repetitive use of knives and hooks. The claimant was referred for treatment with John H. Gilbert, M.D., and placed on light-duty work.

Dr. Gilbert first saw the claimant on June 18, 1999. Claimant complained of left shoulder pain and locking in the right ring finger as well as the left long and ring fingers. Claimant was provided anti-inflammatory medication and placed on light duty. At a follow-up visit on July 16, 1999, claimant received an injection to decrease the swelling and synovitis in the flexor tendon sheath in order to relieve the locking. Dr. Gilbert saw the claimant again on July 30, 1999. The claimant advised Dr. Gilbert at this time that he had relief of pain in the long and ring fingers following the injection of the tendon sheath but still was experiencing locking of the ring finger. Dr. Gilbert recommended the claimant have a tendon sheath release but the claimant declined to have the surgery.

Dr. Gilbert saw the claimant on August 25, 1999, as well as September 8, 1999, with office visits focusing on the trigger fingers. When Dr. Gilbert saw the claimant on October 6, 1999, the claimant complained of persistent left shoulder pain from his work as a chuck boner. Dr. Gilbert diagnosed the claimant as having rotator cuff tendonitis. The claimant underwent 3-4 weeks of physical therapy for the rotator cuff problems. Because his medical records did not indicate further complaints of shoulder pain, Dr. Gilbert concluded the shoulder pain had essentially resolved.

On December 8, 1999, Dr. Gilbert saw the claimant and released him to light-duty work. The claimant could do frequent lifting of up to 35 pounds, occasional 50 pounds with occasional grip, pinch and pull in both hands. But Dr. Gilbert placed a permanent restriction on the claimant of no knife and hook activities. Dr. Gilbert last saw the claimant on January 7, 2000, and rated the claimant with a 60 percent impairment to the left long finger, 40 percent to the left ring finger, 20 percent to the right ring finger which converts to a 6 percent whole body.

On December 18, 2000, claimant was placed in the permanent job as a "puller." Claimant testified the "puller" job is a lighter job than what he was doing when injured but claimant further testified he continues to have problems with his shoulders and fingers because of pulling the hides.

The claimant was referred by his attorney to Pedro A. Murati, M.D., on January 19, 2000, for treatment recommendations. Dr. Murati diagnosed left shoulder pain, left hand trigger fingers, third and fourth digits and right hand trigger finger, fourth digit. Dr. Murati recommended injection of the left shoulder as well as an MRI to rule out rotator cuff pathology. In addition, the doctor recommended additional injections to the trigger fingers.

On April 7, 2000, claimant was examined by Robert Bassett, M.D. Dr. Bassett noted claimant complained of bilateral trigger fingers and left shoulder pain. Dr. Bassett agreed with Dr. Murati's recommendation and provided a cortisone injection to claimant's shoulder. The doctor concluded claimant had minimal signs of shoulder impingement which were resolving and were not ratable.

Dr. Murati saw the claimant again on August 28, 2000, complaining of locking fingers in both hands and pain now in both shoulders. A physical examination was performed again by Dr. Murati. Dr. Murati opined the claimant had trigger fingers of the bilateral long fingers, left rotator cuff strain and right shoulder strain secondary to overuse due to his work-related injury on June 1, 1999.

Using the AMA Guides, Fourth Edition, Dr. Murati rated the claimant for the moderate glenohumeral crepitus of the left shoulder with a 12 percent upper extremity using tables 18 and 19 on pages 58 and 59. For the triggering of the left long finger using tables 18 and 29 on pages 58 and 63, the claimant received a 40 percent digit which converts to an 8 percent hand which then converts to a 7 percent upper extremity. Combining the left upper extremity impairments combine for an 18 percent which then converts to an 11 percent whole person. For the triggering of the right long finger, the claimant receives a 40 percent digit which converts to an 8 percent hand which then converts to a 7 percent upper extremity using tables 18 and 29 on pages 58 and 63. Dr. Murati rated the claimant's upper extremity for the crepitus at 5 percent. Combining the right upper extremity impairments combine for 12 percent which then converts to a 7 percent whole person. Using the Combined Values Chart on page 322, the claimant receives a 17 percent whole person impairment.

Based upon the medical records and physical examination, Dr. Murati placed the following permanent restrictions on the claimant: (1) no climbing ladders, crawling or repetitive heavy grasping or grabbing; (2) no above shoulder level work; (3) no working of more than 24 inches away from the body; (4) no use of hooks or knives; and, (5) no use of vibratory tools. Claimant can occasionally lift, push and pull 35 pounds, frequently lift, carry, push and pull 20 pounds and constantly push and pull 10 pounds.

Job task lists were prepared by vocational experts James Molski and Karen Terrill based upon claimant's work history for the 15 years preceding his injury. Using the task lists, Drs. Gilbert, Bassett and Murati each offered opinions on claimant's task loss based upon each expert's list. Utilizing Mr. Molski's list, Dr. Murati opined claimant suffered a 67 percent task loss, Dr. Gilbert opined claimant suffered a 28 percent task loss and Dr. Bassett opined claimant suffered a 22 percent task loss. Utilizing Ms. Terrill's list, Dr. Murati opined claimant suffered a 47 percent task loss, Dr. Gilbert opined claimant suffered a 29 percent task loss and Dr. Bassett opined claimant suffered a 24 percent task loss.

CONCLUSIONS OF LAW

K.S.A. 1998 Supp. 44-510e(a) states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The claimant continued to work for respondent. At oral argument before the Board, the parties stipulated claimant suffered a 28.626 percent wage loss. Because the claimant is not engaging in work for wages equal to 90 percent of his average gross weekly wage at the time of the accident he is entitled to a work disability.

The foregoing statute defines work disability as the average of the wage loss and task loss. The dispositive issue in this case is the percentage of task loss.

The Administrative Law Judge concluded that because Drs. Bassett and Gilbert's diagnosis, restrictions and task loss analysis were comparable they were the most reliable. The Administrative Law Judge averaged Drs. Bassett and Gilbert's task loss opinions utilizing both vocational experts to arrive at a 26 percent task loss.

Although claimant's treatment with Dr. Gilbert primarily focused on the hands, nonetheless, the claimant also had shoulder complaints and received treatment for that

condition. Dr. Murati recommended injections for claimant's shoulder and claimant subsequently received the recommended additional cortisone injections in his shoulder during his one visit with Dr. Bassett. At regular hearing the claimant continued to complain of shoulder problems.

Dr. Gilbert concluded claimant's shoulder problem had resolved following the physical therapy simply because when he reviewed his office records he did not find any additional recorded shoulder complaints. However, as previously noted, claimant still complained of shoulder pain when he was examined by Dr. Murati a few days after he was released from treatment by Dr. Gilbert. When claimant saw Dr. Murati for treatment recommendations, he still had shoulder complaints. Claimant was later examined by Dr. Bassett and still complained of shoulder pain and even received a cortisone injection. It is difficult to accord much, if any, weight to Dr. Bassett's conclusion that the shoulder pain was resolving when he treated the claimant with an injection but never saw claimant after that one visit.

The claimant consistently complained and was treated for shoulder pain which did not resolve. Accordingly, the Board concludes it is appropriate to include Dr. Murati's task loss opinions because his restrictions address the claimant's shoulder complaints. Accordingly, it is the Board's determination it is appropriate to average Dr. Murati's task loss opinions with the other doctors' opinions.

Giving equal weight to all the tasks loss opinions of Drs. Murati, Bassett and Gilbert results in a 36 percent task loss. The stipulated wage loss of 28.626 percent averaged with the 36 percent task loss results in a 32.313 percent work disability. The Award of the Administrative Law Judge is modified to reflect claimant suffered a 32.313 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 17, 2001, is modified to reflect claimant suffered a 32.313 percent work disability as a result of his work-related accidental injury June 1, 1999.

The claimant is entitled to 134.10 weeks permanent partial compensation at \$366 per week or \$49,080.60 for a 32.313 percent permanent partial general bodily disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director